



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1165 OF 2017

(Before Hon. Justice Mathews N. Nduma)

BAKERY, CONFECTIONERY, FOOD

MANUFACTURING AND ALLIED

WORKERS' UNION (K).....CLAIMANT

VERSUS

KENAFRIC INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. By a consent dated 20th September, 2017 and filed on 3rd October 2017, the parties agreed to proceed by way of written submissions and dispense with oral evidence and pending application. Parties filed submissions by 29th November, 2017. The file was transmitted to Kisumu on 12th January, 2018 and received on 18th January, 2018.

2. This is a matter that ought to have been determined in Nairobi, according to existing reciprocal arrangements where judges transferred are to deal with all part-heard matters in their new station.

Facts of the Claim

3. The 49 grievants whose ranks are appended to the Memorandum of Claim are unionsable employees and some are members of the Claimant.

4. The grievants are employed on fixed term contracts or confirmed by the Respondent in a letter dated 25th April, 2017.

5. The Claimant by a letter dated 3rd March, 2017 had demanded that the grievants be given appointment letters on permanent basis as per the Collective Bargaining agreement terms.

6. A dispute arose, matter was reported to labour and while the dispute was pending, the Respondent purported to terminate the employment of the grievants by letters dated 2nd June, 2017, on the basis that the fixed term contracts had expired and would not be renewed.

7. On 15th June 2017, a certificate of unresolved dispute was issued and the matter was filed in court.

8. The Claim is opposed vide a statement of defence in which it is averred that the grievants were employed on fixed term contracts that had since expired and not reviewed. That the Claim has no basis and it should be dismissed with costs. It should be noted that court issued interim orders stopping termination of employment of the grievants. A subsequent consent by the parties dated 20th September, 2017 and filed on 3rd October, 2017 preserved the status quo obtaining thereby preserving the employment of the grievants until the suit is heard and determined.

Determination

9. The issues for determination are as follows:-

- (i) Whether or not the grievants are unionsable employees and therefore should enjoy the terms and conditions negotiated in the parties Collective Bargaining Agreement.

(ii) What remedies if at all are available to the Claimant.

Issue i

10. It is not in dispute that the parties have a Recognition Agreement and Collective Bargaining Agreement in place. The Claimant contends that all grievants are unionisable employees and are entitled to employment on permanent terms and conditions of service provided in the Collective Bargaining Agreement. The Respondent asserts to the contrary, that it is entitled to employ the grievants on fixed term contract, regardless of whether they were unionisable or not. That the grievants contracts had expired and unless renewed, Respondent should be allowed to separate from the grievants.

11. The Claimant states that employing some of the unionisable employees on different, and unfair terms while doing the same job with others was unfair labour practice and in violation of section 5 of the Employment Act, 2007 and Article 41 of the Constitution of Kenya, 2010.

12. The Claimant prays for judgment against the Respondent in the following terms –

(i) A declaration Order to issue that the actions of the Respondent herein engaging the grievants herein and other unionisable employees and members of the Claimant in respect of jobs and positions whose designation, description, content and substance fall squarely under the collective agreement through fixed term contracts constituted an unfair labour practice, hence unlawful, null and void.

(ii) A declaration Order to issue that the actions of the Respondent herein engaging the grievants herein and other unionisable employees and members of the Claimant in respect of jobs and positions whose designation, description, content and substance fall squarely under the collective agreement through fixed term contracts violates the existing collective agreement.

(iii) An order on injunction to issue restraining the respondent herein from engaging the grievants herein or indeed any other unionisable employees and members of the Claimant, in respect of jobs and positions whose designation, description, content and substance fall squarely under the collective agreement through fixed term contracts.

(iv) A declaration that the Respondent is in flagrant breach of clause 30 of the Collective agreement.

(v) An order directing the Respondent herein to forthwith issue the grievants and/of any other unionisable employees with letters of appointments in the form contained under Appendix B to the collective agreement in compliance with clause 30 of the collective agreement.

(vi) Any other relief this Honourable Court may deem fit and just in the circumstances to grant in the interest of justice.

(vii) Cost of the suit.

13. Clause 30 of the Collective Agreement (CBA) reads –

“Every employee of the company whose terms of service are covered by this Agreement shall receive a letter of appointment in the form shown at Appendix ‘B’ attached to this Agreement.”

14. Appendix ‘B’ titled “Letter of Appointment” has provisions for the position; Date of Commencement; Salary or Appointment; Abridged job description and more importantly provides-

“All other terms and conditions of service are as contained in the Collective Bargaining Agreement existing between the company and the Bakery, Confectionery Food Manufacturing and Allied Workers Union (Kenya).”

15. The Union wrote to the Respondent on 31st March, 2017 stating that, it had come to their knowledge that the Respondent had employed 49 employees, (list attached) on contractual terms within the enterprise. The Union demanded that the employees be given appointment letters setting out their terms and conditions of employment.

16. At page two (2) of the Collective Agreement under the clause titled ‘Recognition’ is provided inter alia –

“The company affords full recognition to the union as a properly constituted and representative body and the sole labour organization representing the interest of all workers who are in the Employment of the company in all negotiable matters concerning rate of pay, overtime, hours of work, method of wage and salary payment, paid leave, duration of employment, medical benefits, Principles of Promotion, terms of employment of all employees who are in the employment of the company as defined from time to time.” (emphasis mine)

17. The Collective Bargaining Agreement provides for the procedure for negotiations dealing with grievances and reference of a dispute to the Ministry of Labour in the event of failure to agree. This procedure was followed in the instant case but matter was not resolved.

18. It is contended by the Claimant that the grievants are employees covered by the Collective Bargaining Agreement. The Respondent has adduced no evidence to rebut this contention by the Claimants.

19. It is not in dispute that all employees of the Respondent were covered by the Collective Bargaining Agreement, unless specifically excluded from the Collective Bargaining Agreement by agreement of the parties.

20. It is not alleged by the Respondent that the grievants held management positions and therefore were not unionsable. To the contrary, the grievants were ordinary employees like all others employees of the Respondent and covered by the Collective Bargaining Agreement. The employees of the Respondent be they members of the union or non-members were in terms of the Collective Bargaining Agreement, unionsable and were all entitled to equal treatment and provision of equal terms and conditions of service. Any deviation from the Collective Bargaining Agreement, terms, without following the negotiations procedure, such as employing some employees on inferior terms of service as had happened to the 49 grievants was a violation of the terms and conditions of the collective Bargaining Agreement.

21. The Respondent is unable to distinguish the finding of the court in **Kenya Shoe and Leather Workers Union v Bata Shoe Company Limited (2017) eKLR** which held that all unionsable employees of the Respondent must be employed in terms of the Collective Bargaining Agreement and any terms of an employment contract contrary to the Collective Bargaining Agreement is null and void.

22. The court therefore finds that the employment of the 49 grievants on fixed term contracts, was indirect violation of the Collective Bargaining Agreement. The fixed term contracts were therefore voidable and subject to replacement, upon demand by the union with the terms and conditions provided in the Collective Bargaining Agreement.

23. Furthermore, the Respondent violated section 5 of the Employment Act, as read with Article 41 of the Constitution of Kenya 2010 by according inferior treatment to the 49 employees as compared to all other unionisable employees who performed the same work and held similar positions with the 49 grievants. The court so finds.

Issue ii

24. Having faulted the conduct of the Respondent in discriminating against the 49 grievants in awarding them inferior terms in violation of the Collective Bargaining Agreement and the Law, the court declares the 49 fixed terms contract given to the grievants null and void and directs the Respondent to give the 49 grievants letters of appointment in terms of clause 30 of the Collective Bargaining Agreement. Furthermore the terms and conditions of employment of the 49 grievants be governed by the Collective Bargaining Agreement clauses without exception. The court so finds.

25. In the final analysis, the court enters judgment in favour of the Claimant as against the Respondent as follows:-

(i) The fixed term contracts given to the 49 grievants are null and void.

(ii) The 49 grievants be given letters of appointment in terms of clause 30 of the Collective Bargaining Agreement with effect from the date of completion of 1st probation period.

(iii) All terms and conditions of employment of the 49 grievants be governed by the relevant clause of the Collective Bargaining Agreement.

(iv) The Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 31st day of July, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 10th day of August, 2018

Maureen Onyango

Judge

Appearances

Danchael Mwangure, General Secretary Claimant Union

Chege Kibathi for Respondent

Anne Njuge – Court Clerk